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**PROTECTING
NATURAL
RESOURCES**

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Pacific Southwest Regional Office, Ecosystem Planning
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Subject: Region 5 Post Disturbance Hazardous Tree Management Environmental Assessment Comments for SFK, SC, and JMP

Sequoia ForestKeeper (SFK), the Kern-Kaweah Chapter of the Sierra Club (SC), and John Muir Project of Earth Island Institute (JMP) thank you for the opportunity to comment on the subject proposal. SFK, SC, and JMP have been involved in the protection of the Sequoia National Forest, the Giant Sequoia National Monument (Monument), the Sierra National Forest, and other forest areas in the Southern Sierra Nevada (SSN) Mountains for many decades and consider the subject proposal a significant action that could have many adverse effects on the global climate, the forest's ecosystems, the Monument objects and values, and the wildlife that depend on the forest habitats of the Sequoia and Sierra National Forests, especially the endangered Southern Sierra Nevada (SSN) Pacific fisher. Due to the size, scope, and potential adverse effects from the proposal, the Forest Service must prepare an Environmental Impact Statement under the National Environmental Policy Act (NEPA).

These comments apply to all three Regional EAs and follow scoping comments that we filed on November 15, 2021, which we incorporate herein by reference.

COMMENTS

1. Failure to Provide All Specialist Reports to Allow Public an Opportunity to Provide Informed Comments

As an initial matter, the draft EAs cite to “wildlife analysis, biological evaluation, and biological assessment” being prepared for the project record. But these supporting documents are not all available for public inspection on the project website. For example, as of May 10, 2022, no biological evaluations were yet disclosed despite repeated requests from the public for all supporting documents to be made publicly available during the comment period. Such material must be disclosed to the public per the NEPA regulations: “No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment.” 40 CFR 1502.21. We therefore again ask that all supporting documents cited in the draft EAs be made public and a new comment period established to

correct this error. *See League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton*, No. 3:12-cv-02271-HZ, 2014 U.S. Dist. LEXIS 170072, at *41-52 (D. Or. Dec. 9, 2014) (“Section 1502.21 plainly prohibits an agency from relying on information in the preparation of an EIS while refusing to make that information available to the public.”)

NEPA “requires that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F.3d 920, 924 (9th Cir. 2015) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). “Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA.” *League of Wilderness Defenders/Blue Mts. Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) (citations omitted). “NEPA’s public comment procedures are at the heart of the NEPA review process.” *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). An agency may not discharge its obligation to provide the public with analysis of the environmental impacts of a project simply by incorporating documents by reference. *Pacific Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1031 (9th Cir. 2012) *vacated as moot*, 133 S. Ct. 2843 (2013). Even when documents are incorporated by reference, the incorporated material must be “reasonably available for inspection.” 40 C.F.R. § 1501.12.

For the Southern Sierra Zone, the EA refers to the biological evaluation (BE), but that document has not been provided to the public. *See R5 Hazards Southern Sierra Zone EA* at 26 (“Direct and indirect effects to these species from the proposed action are . . . summarized in detail in the . . . biological evaluation being prepared for the project record.”).

The Forest Service’s failure to provide the BE violates NEPA and agency regulations and must be provided to the public along with a new comment period.

2. Failure to Consider a Reasonable Range of Alternatives

The Forest Service has made a front-end “policy choice” that the stated goal of safety trumps all other values. But this is a determination that can only be made at the back end, after consideration of a range of alternatives. Moreover, the Forest Service’s dismissal of alternatives is based on a black/white dichotomy—either we do everything exactly as we propose, or we do nothing at all. By dismissing from detailed consideration every alternative other than the proposed alternative, the Forest Service has thwarted NEPA’s policies.

The “touchstone” of a lawful alternative’s analysis is whether the agency’s “selection and discussion of alternatives fosters informed decisionmaking and informed public participation.” *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 872 (9th Cir. 2004). Federal agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives to a proposed project.” *Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).

And as has occurred here, “[o]ne obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose and need so slender as to define competing reasonable alternatives out of consideration.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 n.7 (9th Cir.

1999). Here, the purpose and need is defined in such a way that only the proposed action can meet it. For example, an alternative that cannot “maintain the integrity and utility of National Forest System roads, trails, and facilities” interpreted to encompass *all* NFS roads and trails, therefore cannot be met by any alternative which does not treat every road. Another purpose and need entails “a need for economic and operational efficiency,” which the Forest Service invokes as rationale for limiting alternatives.

But what about selective road closure, or different prescriptions for low, moderate, high burn areas, or ecologically critical areas, or road prioritization, or different prescriptions for different road maintenance/use levels?

For example, the Forest Service refused to give full consideration to an alternative that would close many Level 2 roads (those not maintained for public use) and drop proposed hazard tree logging on such roads, based on the response that such roads are needed ostensibly for recreation. This mischaracterizes the alternative proposed in scoping comments. Specifically, the requested action alternative would indefinitely convert Level 2 roads, which are not needed for access to recreation sites or private inholdings, into Level 1 roads—i.e., to indefinitely close that particular portion of Level 2 roads identified in the EA to public use and drop such roads from proposed roadside hazard tree logging. Under this suggested action alternative, Level 2 roads that are needed for access to important recreation sites such as campgrounds or trailheads, or which are needed for access to private inholdings (e.g., with cabins), would not be converted to Level 1 and would receive hazard treatments. Given the high percentage of total roads in the proposal that are Level 2, this proposed action alternative would dramatically reduce adverse impacts of post-disturbance logging on imperiled, threatened, and endangered wildlife species, including the Pacific fisher, the spotted owl, and the black-backed woodpecker, while minimizing impacts on recreation. Further, we requested an additional action alternative that would leave all large felled trees—those over 20 inches in diameter—on the ground (and not remove them) for carbon storage, nutrient cycling, and large downed log wildlife habitat.

3. Unlawful Tiering to R5 Hazard Tree Guidelines, Never Analyzed Under NEPA

For the R5 project(s) (across all zones), the Forest Service has unlawfully tiered to its hazard tree guidelines: *Hazard Tree Guidelines for Forest Service Facilities and Roads in the Pacific Southwest Region* (USDA Forest Service, “R5 Guidelines”). Tiering is only permitted when an agency has previously prepared an EIS or EA addressing general matters and incorporates by reference such general discussions in a subsequent EIS or EA while focusing in the subsequent EIS or EA on more specific issues. 40 C.F.R. § 1508.1(ff). Tiering to a document that has not itself been subject to NEPA review is not permitted. *See, e.g., Kern v. U.S. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002) (“[T]iering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA. While NEPA empowers neither the plaintiffs nor this court to second-guess the BLM’s management decisions, it does require the BLM to articulate, publicly and in detail, the reasons for and likely effects of those management decisions, and to allow public comment on that articulation.”); *see id.* (holding, as it warned in *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 662-63 (9th Cir. 1998), that a NEPA analysis for a management plan may not tier to guidelines for which an EIS has never been prepared).

The Forest Service dismissed alternatives and failed to disclose or consider site-specific impacts based on risk assessments and policy decisions made in the R5 Guidelines and/or other non-NEPA documents. For example, it dismissed alternatives because they involve retaining “hazard” trees. But the assessment of what constitutes a “hazard”/acceptable levels of risk, has never undergone NEPA. The proposal to limit the assessment heavily weighs the scales in favor of safety. But neither the R5 EAs nor the Guidelines provide any assessment of the environmental trade-offs of this policy choice – balancing over-inclusive logging versus wildlife habitat, carbon storage, water quality, etc.

4. Failure to take a Hard Look at Cumulative Impacts¹

A cumulative impact or effect is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable future actions* regardless of what agency ... or person undertakes such other actions. Cumulative impacts can result from *individually minor but collectively significant actions* taking place over a period of time.” *Kern*, 284 F.3d at 1075 (quoting *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir.2001)); *see also Neighbors of Cuddy Mountain*, 137 F.3d at 1378 (“[W]here ‘several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS.’ *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990).”)

Consideration of cumulative impacts requires “some quantified or detailed information; . . . [g]eneral statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). The cumulative impact analysis must be more than perfunctory; it must provide a “useful analysis of the cumulative impacts of past, present, and future projects.” *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 810 (9th Cir. 1999); *see also Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001) (requiring cumulative effects analysis requirement to EAs).

In each EA, the Forest Service has failed to provide the necessary analysis to consider cumulative effects as required by NEPA. The EAs are peppered with cursory and incomplete cumulative effects analyses without any quantified or detailed information in each of the various sections for resources analyzed. The analysis makes conclusory statements that agency personnel considered cumulative effects, but most of these statements do not reference any site-specific analysis or provide any quantified data or detailed information, always referring either to a general Cumulative Effects section in the EA or to the Appendix that provides an incomplete list of actions that may cause cumulative effects. Such cursory and conclusory analysis violates NEPA’s hard look requirement.

The EA for the Southern Sierra Zone is no exception. The sole narrative discussion regarding cumulative effects is a half-page mention and conclusory statement. EA, p. 24. There, the EA

¹ As of May 20, 2022, all Federal agencies must again comply with the same cumulative effects analysis requirements that existed before they were repealed during the previous administration. *See* 87 Fed. Reg. 23453, 23469 (April 20, 2022) (defining effects to include cumulative effects).

states, without support in a wholly conclusory fashion, that the Interdisciplinary (ID) Team “considered past, present, and reasonably foreseeable future actions relevant to the proposal, including how they may have contributed to existing conditions and trends.” *Id.* It then refers to Appendix C for a list of ongoing and foreseeable projects. The remaining narrative only discusses the ID team’s process of considering past actions, the scale, and its timing. But there is no disclosure, discussion, or analysis of effects.

Appendix C is of no further help in disclosing or analyzing cumulative effects. EA, pp. 81-82. Appendix C is a table with 4 columns, three of which list the project name, location, and its anticipated implementation start. The final column merely provides a description of the project action, but there is not even “some quantified or detailed information; . . . [g]eneral statements about ‘possible’ effects and ‘some risk’ ” to determine whether the Forest Service took a “hard look” at the effects. *See Neighbors of Cuddy Mountain*, 137 F.3d at 1379-80. The analysis is not even perfunctory, since it has absolutely no “useful analysis of the cumulative impacts of past, present, and future projects.” *Muckleshoot Indian Tribe*, 177 F.3d at 810. There is no information about acreages, effects, or descriptions of resources that may be cumulatively affected.

As an example of a cumulative effects analysis, Exhibit A hereto, or the Exchequer Restoration Project EIS, has a level of cumulative effects analysis that could be considered minimally adequate with respect to the Pacific fisher and other species. There, the analysis for a much smaller project, at roughly 18,000 acres, provides an extensive analysis of direct and indirect effects on fisher habitat, and provides two levels of analysis for cumulative effects—Levels 3 and 4—at the landscape area scale and the population core scale, respectively. Exhibit A, p. 382. It is clear that the Forest Service knows how to do the cumulative effects analysis. There, it has posted its map “of analysis for cumulative effects on the fisher” which includes both the Sierra and Sequoia National Forests. Exhibit A at 383. A subsequent table lists roughly fifteen projects included in its cumulative effects analysis, *id.* at 388-89 (Table 100), six of which burned in the 2020 Creek Fire. And there is a robust discussion of landscape-level effects, providing an analysis of fisher habitat affected by various projects with acreages displayed in the table and narrative analysis as discussed in the text of the EIS.

The Exchequer EIS clearly shows that the Forest Service could have done proper cumulative effects analyses for the R5 Hazard Project EAs. But the fact that the Forest Service has foregone any such analysis here means that it has violated NEPA.

5. The Forest Service Must Prepare EISs, Including for the Southern Sierra Zone Project

The size of the proposal, the large number of trees proposed to be removed from each project area, as well as the many adverse climate, soil, stream, and wildlife habitat effects, are on a scale that is much larger than the largest timber sale operations implemented in national forests in California. Hence, each project is a major federal action that would require analysis in an Environmental Impact Statement (EIS) because the effects are not insignificant.

The Forest Service’s failure to produce one or more EIS’s for its proposed actions would violate NEPA for several reasons, including the potential for significant environmental effects caused by

the size and intensity of logging and the cumulative effects of the actions, as discussed above. Here, the Forest Service must either (1) prepare a single programmatic EIS (followed by site-specific NEPA analyses, likely with an EIS for each project), or (2) prepare individual, site-specific EIS analyses. Instead, the Forest Service chose a third pathway that is inconsistent with NEPA—preparing regional EAs that are essentially programmatic documents that fail to disclose and consider site-specific impacts, without any follow-up or site-specific analysis.

NEPA provides that environmental impact statements must be prepared by federal agencies on “proposals for . . . major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Major federal actions include the “[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; . . . [or] [a]pproval of specific projects, such as construction or management activities located in a defined geographic area.” 40 C.F.R. § 1508.1(q)(3)(iii)-(iv).

An EIS must be prepared if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (citation omitted); *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). To trigger this requirement a “plaintiff need not show that significant effects will in fact occur”; raising “substantial questions whether a project *may* have a significant effect” is sufficient. *Greenpeace*, 14 F.3d at 1332 (emphasis added); see *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (accord).

If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project’s impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a “hard look” at the potential environmental impact of a project. See *Blue Mt. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal citations omitted). The two-page draft Finding of No Significant Impact (FONSI) fails to objectively provide a convincing statement of reasons. See Southern Sierra Zone EA at 52-53. For example, while there are clearly both short- and long-term effects, as well as beneficial- and adverse effects, the FONSI simply references sections in the EA and project design features, but it never provides any convincing reasoning or even conclusion why the effects may be insignificant, and it even fails to even mention cumulative effects. EA at 52. Moreover, the FONSI only provides justifications for its selected alternative regarding “effects on public health and safety,” but it never even concludes whether these effects are insignificant or whether the risk of cumulative effects from other operations are insignificant. EA at 53.

An agency “cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2004). Nor can an agency minimize an activities’ environmental impact by adopting a broad scale analysis and marginalizing the activity’s site-specific impact. See, e.g., *Pac. Coast Fed’n of Fishermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1036 (9th Cir. 2001).

In each EA, the Forest Service did not take the requisite “hard look” at the environmental impacts of its planned hazard tree programs or projects or the cumulative effects of those and

other proposed timber sale projects. Moreover, the Forest Service, in its EAs and FONSI, has failed to provide convincing statements of reasons to explain why the projects' impacts are insignificant.

With regard to the actions proposed in the Sierra, Sequoia, and Inyo (the Southern Sierra Zone), the size and intensity of logging proposed along 1,272 miles of roads on sensitive post-fire soils in critically-important wildlife habitat for various imperiled, threatened, and endangered species, logging on up to 98,062 acres, requires a more thorough analysis in an EIS. EA at 10 (Table 2). In the past, the Forest Service was compelled in similar types and much smaller-sized projects to prepare EISs. For example, in 2018, the Sierra National Forest prepared an EIS for the Exchequer Restoration Project, which included logging, fire risk reduction, and species habitat management on 18,345 acres. *See* Exhibit A, p. 1. While the current proposal may have a different purpose, the effects from logging on imperiled species' habitat are very similar or even greater in burned areas, such as those in the R5 Hazard Projects, and the current proposal covers more than 5 times the acreage of the Exchequer Project. And that does not even include consideration of cumulative effects from past, present, or reasonably foreseeable future actions. See the partial list of these projects in Appendix C of the EA and discussion in the previous section. And while the Forest Service has not listed the acreages associated with each of the projects listed in Appendix C, the current proposal is larger in acreage than most of those listed projects.

The Creek Fire Ecological Restoration Project in the Sierra National Forest, listed in Appendix C, has a footprint of roughly 135,000 acres (*see* Exhibit B, hereto; Scoping Notice, pp. 26-27), and the current roadside hazard proposal would also be conducted in the same footprint of that proposal, with effects in addition to those from the Creek Fire Project.

Similarly, the Castle Fire Ecological Restoration Project in the Sequoia National Forest/Giant Sequoia National Monument would be conducted on up to 50,000 acres that burned at moderate to high severity and proposes to include removing dead and dying trees and constructing temporary roads in a fragile burn area. *See* Exhibit C, hereto; Scoping Notice, pp. 1-2. Again, the current roadside hazard proposal would also be conducted in the same footprint of that proposal, with effects in addition to those from the Castle Fire Ecological Restoration Project.

In another example, the Forest Service prepared an EIS for the Tobias Ecosystem Restoration Project in the Sequoia National Forest, which would have thinned and reduced fuels on roughly 4,900 acres (*see* Exhibit D, hereto), which is a small fraction of the size and the combined impacts of the current proposal and the others concurrently-proposed projects.

An EIS is also required to consider the cumulative effects from the proposal, from the tree removal projects being implemented throughout these forests under and along transmission lines from companies like PG&E and SCE, and other planned logging and/or vegetation management projects in and adjacent to the Sierra and Sequoia National Forests. Moreover, the past and current drought, as well as the 2020 and 2021 fires have had impacts on habitat for the endangered Southern Sierra Nevada fisher and other species of concern and various other natural resources. The fires, power company clearing, other logging activities, and the proposed actions (and any action alternatives) are likely to have significant direct, indirect, and cumulative effects

on the SSN fisher population on the Sierra and Sequoia NFs, as well as the fisher's ability to disperse or move through a fragmented fire and project area.

For those reasons, the Forest Service's proposal is a major federal action that would have a significant effect on the environment, the FONSI is unfounded, arbitrary and capricious, and the agency must prepare an EIS to comply with NEPA.

6. The Initial Action Should Only Allow Felling of Imminent Hazards, and any Emergency Situation Determination (ESD) should be Limited to Addressing only Imminent Hazards.

The Forest Service must go back and reconsider its proposed action and consider alternatives that are more reasonable and practical.

The logic in a recent decision from the U.S. District Court in Oregon should apply to this project in order to avert imminent hazards. In that case, *Cascadia Wildlands v. Warnack*, No. 6:21-cv-01227-MC (D. Or., Nov. 5, 2021) (provided during scoping as Attachment A), the Forest Service used a CE to authorize the removal of hazard trees from hundreds of miles of road on the Willamette NF, which included a decision to remove trees with all hazard ratings. While the Willamette NF is in Region 6, the Forest Service used the Region's *Field Guide for Danger-Tree Identification and Response* ("Filip" guide, similar to the R5 Hazard Tree Guidelines), the Court used the guide to explain its reasoning to only allow imminent hazard treatments:

For most recently killed trees, exposure duration along roads mainly is intermittent (drive-by traffic) *and therefore the trees are not a danger*. However, due to the large number of recently killed trees in these situations, there is a higher risk of tree failures occurring, because stands are often more open following large disturbances, and trees may be more prone to windthrow or windshatter. *After five years, most of these trees (except cedar, juniper, larch, or large Douglas-fir) will have imminent-failure potential and therefore will become danger trees. The challenge is deciding when to treat such trees that are not now a danger but will become danger trees in five years.* Waiting five years for thousands of trees to become dangers presents at least three problems for forestland managers: 1) some trees may fail before they have been dead for five years, 2) older, dead trees have less commercial value because of delay and defect than recently killed trees, and 3) older, dead trees are more dangerous to fell because of increased decay and defect.

Citing the Guide at 46-47 (emphasis added). It should be noted that the Region 5 Hazard Tree Guidelines also identify hazard trees through their tree rating criterion, and imminent hazards are trees with a "high" hazard rating of 6-7. *See* R5 HT Guidelines, p. 20. For trees with lower ratings, such as 1-3, the Guide suggests "no action" whereas a rating of 4-5 only suggests "monitor." *Id.* For a tree to get a "high" rating of 6-7, the tree must have both a "high failure impact" rating of 3 plus a "high potential for failure: serious defect" of 3 (or 4). This "second value, the failure potential, requires the inspector to estimate the likelihood that, prior to the next inspection, the defective tree or tree part will fail during the season when the target is present." *Id.* at 19. The current season in the Southern Sierra Zone, after the 2020 and 2021 fires, is the same as the 1-2 year timeframe discussed in the reasoning by the Court in *Cascadia Wildlands*.

In that case, the Court recognized the significant problems facing the Forest Service, and the decision only allowed the felling of trees that were in imminent danger of falling within striking distance of the roads. In this sense, the court observed, the Project was akin to that in *EPIC v. U.S. Forest Service*, because, “[w]hile all of the trees within the scope of the Project may be hazardous in some sense, many of them pose no imminent hazard.” *EPIC*, 968 F.3d 985, 990 (9th Cir. 2020). As was the case in *EPIC*, “[t]he Project does not target only trees that pose an immediate danger to travelers.” *Id.* at 991.

In a footnote, the Court explained further:

The Project authorizes felling of trees on 326 miles of Level 2 roads. Level 2 roads are only open to high clearance vehicles. . . . The Forest Service notes that on these roads, “[t]raffic is normally minor[.]” *Id.* “Motorists should have no expectations of being alerted to potential hazards while driving these roads.” *Id.* Additionally, the possibility that fallen trees—many of which have a low likelihood of falling within 5 years—will impede first responders as they respond to fires is not an imminent danger or hazard, but rather a speculative hazard that may occur at some future date. While the Court understands it would be more convenient and cost-effective for the Forest Service to prevent future road hazards via a preemptive commercial logging operation not subject to NEPA review, the scope of this Project exceeds that open to a CE.

Cascadia Wildlands, Slip Op. at 11, n. 3 (citing *EPIC*, 968 F.3d at 990). Given that the Forest Service wanted to log many more trees than just imminent hazards, the Court issued an injunction limiting the actions the Forest Service would be allowed to take without a sufficient NEPA analysis:

As to the scope of the injunction, the Forest Service is enjoined from felling any tree with a low likelihood of failure within 5 years as determined in Filip [the R6 HT Guide]. . . . The Forest Service is enjoined from felling any tree with a likely failure potential in Filip. . . . Filip indicates these trees “are defective or decayed, but it would take moderate effort to make them fail.” *Id.* As these trees have a high probability of failure within 3 to 5 years, they fall outside of the CE for the reasons discussed above. The Forest Service may, however, fell any tree at risk of imminent failure (as defined in Filip) within striking distance of a road. “Imminent failure” in this sense means: “Trees or their parts are so defective or decayed that it would take little effort to make them fail. These trees or parts have a high probability of failure within one year.” . . . The Forest Service must leave any felled tree where it falls, with the exception that it may remove any tree that falls on a road to a safe location beside the road. To clarify, the Forest Service is enjoined from removing any felled tree pending the completion of an EA or EIS.

Id. at 14.

And while here the Forest Service is not proposing to use a CE for the current Region 5 proposal, it is proposing to only analyze its massive proposal for hazard tree abatement along thousands of miles of mostly Level 2 roads using only EAs to include trees with low and moderate failure

potential, even though the Forest Service could close some of those roads or come back and deal with non-imminent hazards after it considers the likely cumulative and adverse significant effects, which require a full analysis in one or more EISs.

Emergency Situation Determination (ESD) Reasoning is Poorly Explained

Instead, the R5 Proposal continues to suggest that the administrative process should be truncated by seeking an ESD with a focus on “the most urgent actions in the highest priority areas,” but it fails to list for which urgent actions and what priority areas it will seek an ESD:

Due to the critical and time-sensitive nature of the proposed actions, the Regional Office is still considering whether to seek an Emergency Situation Determination (which would waive the pre-decisional objections process under 36 CFR 218) or utilize other emergency authorities to expedite implementation on all or portions of the project. We are concerned that expediting implementation reduces one last formal public involvement opportunity prior to a final decision, yet we also recognize the urgency to implement some or all of these actions starting in late spring or early summer of 2022. It is our intent however, to focus use of these authorities on the most urgent actions in the highest priority areas, while allowing for public input prior to final decisions and implementation.

EA, p. 53-54. The unpredictability of the effects on the endangered SSN fisher population, the cumulative removal of massive quantities of carbon from tree removal from the combined proposed actions across 10 national forests, by themselves and in combination with other projects, the need to restrict management in sensitive species habitats, and the need to reduce or restrict overuse from recreational activities enabled by enhanced access from the proposed activities all provide evidence that the effects from these activities are not clearly known.

Therefore, any activities should be limited until a full EIS to analyze these effects with full public input and a robust policy of public participation is prepared. Seeking an ESD or alternative NEPA arrangements will only lead to poor decision-making and associated poor project design and implementation that will make matters worse, with unknown or unpredictable effects from such a massive proposal.

Furthermore, an ESD combined with a truncated public involvement process will make it very likely that this proposal will be immediately challenged in court and potentially result in an injunction of many or all of the activities proposed. Hasty analysis and decision-making is vulnerable to mistakes and legal violations, which is clearly the case here.

7. Failure to Analyze the Potential Adverse Effects the Proposal Could Have in Increasing Fire Severity and Fire Spread.

The analysis has not adequately discussed recent scientific evidence that the actions proposed could actually increase fire severity and rate of spread in the future. We raised this issue in scoping, and reassert it here.

Tree removal and fuels reduction methods used to manage forests that open the forest canopy can cause more problems than they claim to solve. When trees and fuels are removed on the scale of 400-600 ft wide hazard tree corridors throughout the forests, the trees that normally block the wind are no longer there to slow windspeeds, thereby exacerbating the speed a wildfire can spread. And opening the forest canopy also creates a chimney effect, which increases the flow of oxygen into the fire area and increases wildfire severity.

Current and recent Forest Service funded research demonstrates that atmospheric coupling at the process scale (e.g., Banerjee et al 2020, *Effects of canopy midstory management and fuel moisture on wildfire behavior* and Atchley et al. 2021, *Effects of fuel spatial distribution on wildland fire behaviour*), and at the larger landscape scale (e.g., Coen et al., 2018, *Deconstructing the King megafire*) is critically important, and demonstrates how atmospheric coupling influences the rate of oxygen replenishment during a fire, which show that for historic megafires, coupling to the atmosphere is more significant than both fuel load and climate trends. See Scoping Attachments B, C, and D (Banerjee, Atchley, and Coen, respectively, submitted previously).

Research using detailed high-resolution numerical simulations reports that removing ladder fuels can easily increase the likelihood of crown-fire occurrence, despite being designed to reduce it (Banerjee et al. 2020). The reason for this seemingly counterintuitive result involves the important role atmospheric motions play, and it demonstrates how focusing solely on forest fuels can make matters worse, if one neglects to also consider how vegetation treatments can increase the oxygen supply to a fire.

When ladder fuels are removed, the ground-level windspeed and turbulent mixing both increase, leading to faster fire spread and greater oxygen-transport efficiency; this, in turn, results in increased fire intensity. As recent high-resolution numerical fire simulations show (e.g., Banerjee et al. 2020, Atchley et al. 2021), in many cases this aerodynamic effect is more important than the fire-dampening effects of the fuels reduction being evaluated. While current models used by the Forest Service only use constant 20 mph windspeeds for varying degrees of ladder fuel removal (Jones et al. 2010), increasing levels of fuels reduction will be accompanied by higher windspeeds as the sub-canopy wind drag drops, but this is not considered by Jones et al., and this is typical of operational fire-model use.

The Banerjee and Atchley studies used high-resolution numerical fire simulations to demonstrate just how consequential neglecting canopy wind-drag effects can be, leading to potentially disastrous results. In both studies, separate simulations were performed to compare different fuels configurations, and both papers demonstrate that the removal of ladder fuels reduces the sub-canopy wind drag, ultimately leading to increased fire spread. In other words, they both show how fuels-reduction treatments can increase fire spread, which is the opposite of what the operational model studies predict. Furthermore, the Banerjee et al. 2020 paper goes further and also shows that aggressive ladderfuel removal increases the likelihood of overstory crown fires compared to more modest ladderfuel reductions, which is again opposite to operational model-run predictions.

From these results, it is clear that evaluating wildland fire resilience using current Forest Service operational fire-modeling theory is suspect, especially since operational models fail to properly include all of the important effects associated with specified fuels treatments, especially canopy wind resistance, which both Atchley et al. (2021) and Banerjee et al. (2020) show are extremely important.

In addition to the focused process studies like those of Atchley et al. 2021 and Banerjee et al. 2020, realistic high-resolution numerical fire simulations are also used to study the details of real-world fires. For example, Coen et al. 2018 used high-resolution simulations to deconstruct the 2014 King Fire, and its authors showed that fire-induced winds were primarily responsible for the fire's rapid growth and size. In their study, Coen et al. demonstrate that drought and fuel load were secondary effects compared to fire-induced atmospheric motions, which operational fire-behavior models neglect. Two important conclusions from the study are: (1) "... extreme fires need not arise from extreme fire environment conditions," and (2) "... models used in operations do not capture fire-induced winds and dynamic feedbacks so [they] can underestimate megafire events." In other words, the inability of operational models to simulate plume-driven megafires like the 2014 King Fire is not due to climate change or extreme weather events, but instead because of known missing physics in the operational models.

These new findings apply directly to the current proposal because of its massive size and scope and the fact that the wide hazard tree corridors along roads are likely to experience these wind- and oxygen-driven effects during a wildfire. For those reasons, the Forest Service's NEPA analysis must consider and analyze these potential significant effects, which could be caused by the proposal.

In fact, the 9th Circuit Court of appeals has found that when the Forest Service ignored similar concerns in their NEPA analysis, it violated NEPA. In *BARK v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020), one of the purposes of the project was fuel reduction to reduce the risk and severity of wildfires. There, the plaintiffs provided substantial expert opinion and scientific reports, which disputed that the treatments would be helpful and showed that they could potentially increase fire risk or make fires more severe. *Id.* at 870. The Court in *BARK* noted:

Importantly, even the Fuels Specialist Report produced by the USFS itself noted that "reducing canopy cover can also have the effect of increasing [a fire's rate of spread] by allowing solar radiation to dry surface fuels, allowing finer fuels to grow on ... the forest floor, and reducing the impact of sheltering from wind the canopy provides."

BARK, 958 F.3d at 871. But the analysis "did not engage with the considerable contrary scientific and expert opinion; it instead drew general conclusions such as that '[t]here are no negative effects to fuels from the Proposed Action treatments.'" *Id.* The Court held that the scientific dispute about the potential negative effects was of substantial consequence because "fire management is a crucial issue that has wide-ranging ecological impacts and affects human life. When one factor alone raises 'substantial questions' about whether an agency action will have a significant environmental effect, an EIS is warranted." *Id.*

The Court found that “[s]ubstantial expert opinion presented by the Appellants during the administrative process disputes the USFS’s conclusion that thinning is helpful for fire suppression and safety.” *Id.*

For these reasons, the analysis must consider these effects from the proposal in an EIS.

8. The Proposal is Likely to Harm the endangered SSN Pacific fisher, California Spotted Owl, and Northern Goshawks; Effects Which are Significant and Must be Analyzed in an EIS.

While normal operating guidelines may restrict noise within 0.25-miles of den sites from March 15 to June 15, scientific studies of the SSN fisher confirm that fishers use post-fire burned forest habitats² and female fishers return to their natal and maternal dens with their kits well after June 15—into late September,³ so the Forest Service should follow the research and not remove post-fire snag habitats or take the chance of harming / taking / killing the endangered SSN Pacific Fisher kits by allowing tree removal activities after June 15.⁴

We are concerned about the direct, indirect, and cumulative effects from this project and other projects in the SSN Fisher Conservation Area and how the Forest Service has analyzed the effects, as discussed above. Fishers use large areas of primarily coniferous forests with fairly dense canopies and large trees, snags, and down logs. A vegetated understory and large woody debris are important for their prey species.

The proposed logging would result in removal of multiple millions of board feet of timber as well as substantial volumes of biomass from the project area. The project would also cause significant additional fragmentation of already-fragmented habitats for not only fishers, but also in California spotted owl and goshawk protected activity centers. The acres of logged areas would likely be replanted with a closely-spaced mono-culture of pines, potentially causing further long-term degradation of habitat.

The proposal must strictly apply the wildlife restrictions and sufficiently analyze potential adverse effects on these and other species. Because the effects from this and other hazard tree proposals along roads combined with the changed baseline environmental effects from the 2020 and 2021 fires are significant, the Forest Service must prepare an EIS and consider a full range of alternatives that minimize adverse effects, including felling and leaving trees and/or topping trees to prevent them from striking the road, trail, campground, or other improvement.

The final plan for this proposal must include standards to inspect trees as possible dens for fishers. Prior to marking trees for removal in denning habitat of the SSN fisher, a qualified

² See:

https://d2k78bk4kdhbpr.cloudfront.net/media/publications/files/Fisher_use_of_a_postfire_landscape_Thompson_et_al_2021.pdf

³ See: https://www.fs.fed.us/psw/news/2009/090915_fisherkit.pdf

⁴ See: https://consbio.org/products/publications/fisher-use-postfire-landscapes-implications-habitat-connectivity-and-restoration?utm_source=CBI+Master+List&utm_campaign=3341983f2b-EMAIL_CAMPAIGN_2021_10_04_06_19&utm_medium=email&utm_term=0_1548d4a8b9-3341983f2b-327484753

biologist must first inspect locate / verify / document all large hazard trees, danger trees, or defect trees containing cavities and clearly mark and protect these trees from being felled or removed.

For Sequoia ForestKeeper, the Kern-Kaweah Chapter of the Sierra Club, and John Muir Project of Earth Island Institute,

A handwritten signature in blue ink, appearing to read "René Voss". The signature is fluid and cursive, with a long horizontal stroke at the end.

René Voss – Attorney at Law